



Litigation Update

Litigation Section News

April 2004

Changes in case management

goal: After an ad-hoc committee consisting of members of both the plaintiff and defense bars, including members of the Litigation Section, complained to the Judicial Council of the mechanical application of time standards by many judges in setting cases for trial, the Judicial Council modified several rules effective January 2004. California Rules of Court, rule 209(b) reduces the guidelines for cases to be resolved within 12 months and requires individualized case management. Rule 212(j) specifies criteria the court must use in determining the appropriate trial date and rule 375(c) specifies the factors courts must consider when ruling on a motion to continue a trial. The intent of these rules is to give the court more flexibility and to encourage it to be more mindful of the needs of the litigants when scheduling trials and when ruling on motions to continue trials. *See also, Polibrid Coatings, Inc. v. Sup. Ct.*, (Cal. App. 4th Dist., Oct. 21, 2003) 112 Cal.App.4th 920, 923.

Parties cannot waive jury in a pre-dispute contract:

Disagreeing with *Trizec Properties, Inc. v. Sup. Ct.* (1991) 229 Cal.App.3d 1616, [280 Cal.Rptr. 885], the First District Court of Appeal, Division Five, in an opinion by Justice Simons, held that parties cannot by contract waive their right to a jury trial. The court concluded that under the California Constitution, only the Legislature may prescribe the method for waiving a civil jury. Because there is no statutory authority for a pre-dispute jury waiver, a contractual provision attempting to do so is unenforceable. *Grafton Partners LP v. Sup. Ct.* (Cal. App. 1st Dist., Feb. 6, 2004) 2004 [DJ DAR 1435].

Note: Although the court's analysis of the constitution and statutes is logically correct, nevertheless it is ironic at least to permit parties, in their contracts, to waive the right to trial altogether (e.g., by an agreement to

arbitrate), but prohibiting them from agreeing in their contract that any dispute may be resolved by a judge sitting without a jury.

Note: Analogously, an agreement to have a sitting judge act as an arbitrator, whether made as part of a contract or as part of an agreement after the litigation commences, is invalid. *See, Heenan v. Sobati* (2002) 96 Cal.App.4th 995, [117 Cal.Rptr.2d 532 and *Elliott & Ten Eyck Partnership v. City of Long Beach* (1997) 57 Cal.App.4th 495, [67 Cal.Rptr.2d 140]; *see also*, Cal. Rules of Court, rule 1604(b) – list of persons eligible to sit as judicial arbitrators does not include sitting judges).

"Pooled information" and the attorney-client or other privileges:

Lawyers representing clients with common interests will at times agree to share information subject to the attorney-client or some other privilege. To what extent does such sharing waive the privilege? For an excellent discussion of a doctrine variously denominated as "common interest," "joint defense," or "pooled information doctrine" and its limitations, *see, Oxy Resources California LLC v. Sup. Ct.* (Cal. App. First Dist. Feb. 11, 2004) [2004 DJ DAR 2003].

Take care in drafting declarations:

In *Lockheed Litigation Cases* (Cal.App.2nd Dist., Feb. 2, 2004) [2004 DJ DAR 1251], the court affirmed a summary judgment because of inadequacies in the opposition's declarations. When preparing a declaration, whether in connection with a motion for summary judgment or in support of, or in opposition to, any other motion, be sure to include the same *foundational* facts as you would present in court during a trial. It is not enough to have the declarants state "the light was green." The declaration must contain sufficient facts to demonstrate that the declarant was present and in a position to observe the color of the light

at the time of the accident. And a declaration by an expert witness must include the witness's qualifications and the facts upon which the expert opinion is based.

Litigation Section Events

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March 2004

Receive a discount at The Men's Wearhouse when you donate your old suits for those in need.
Call 800-776-7848 for information

Champions of the Courtroom

The Art of Trying Cases

April 16–18, 2004

Silverado Resort, Napa, CA

For registration and information call Tom Pye at (415) 538-2042 or visit www.calbar.org/litigation

A Week in Legal London

June 28–July 2, 2004

For registration and information call Wayne Currier at (415) 538-2546 or visit www.calbar.org/litigation

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